FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 970

KAHN ENGINEERING CO., INC., *Petitioner*,

v.

AMERICAN SECURITY & TRUST COMPANY, a banking corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kahn Engineering Co., Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on December 11, 1958.

CITATIONS TO OPINIONS BELOW

The oral opinion of the trial court was not reported, but is printed in Appendix A hereto, *infra*, p. 1a.

The opinion of the Court of Appeals, as amended by the order of that Court dated February 26, 1959, printed in Appendix B hereto, *infra*, pp. 2a, 3a, is reported in 263 F. 2d 485 (adv.).

JURISDICTION

The judgment of the Court of Appeals was entered December 11, 1958. (R., p. 187) Petitioner filed its petition for rehearing on December 23, 1958. (R., p. 188). By order dated February 26, 1959, the Court of Appeals modified its former opinion. (R., p. 207) The petition for rehearing was denied March 2, 1959. (R., p. 208). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals so far departed from normal and accepted judicial procedure as to warrant supervisory action by this Court, when it rested its affirmance of a directed verdict upon a document which had not been tendered or received in evidence, and when available evidence challenging the validity of the document had not been presented, since the trial Court, in directing the verdict on a wholly different ground, had expressly refused to consider the document in question?

STATUTES INVOLVED

The statute involved in this case is the Uniform Negotiable Instruments Law, Act of March 3, 1901, 31 Stat. 1395, ch. 854, § 1304 et seq., 28 D. C. Code (1951 Edition), § 101 et seq. Pertinent provisions of this statute are set forth in Appendix D, hereto, *infra*, pp. 4a to 7a.

STATEMENT

This suit sought to recover the value of a check belonging to petitioner, a financially distressed corporation, from the respondent bank, which had accepted the check under an unauthorized endorsement, and thereafter collected it from the drawee bank.

The check in question was drawn by the Treasurer of Baltimore County, Maryland, payable to the order of "Kahn Engineering Company" (R., p. 118a, Plaintiff's Exhibit #4), in the amount of $23,069.41. It was one of a series of checks issued by the County Treasurer in payment of the county's obligation under a contract for the construction of a Police and Fire Station at Parkville, Baltimore County, Maryland, (R., p. 95), to which (Plaintiff's Exhibit #2, R., pp. 113-116) the parties were the County Commissioners of Baltimore County, and Kahn Engineering Co., Inc., the petitioner. The performance bond (Plaintiff's Exhibit #3, R., pp. 116-118) required under the contract was executed by Kahn Engineering Co., Inc., as principal, and Maryland Casualty Company, which had been indemnified against loss on the bond by the petitioner and by its president, J. Leon Kahn, individually, as surety.

At the time of this contract, the stock of the petitioner was owned by J. Leon Kahn, his wife, Helen Kahn, and by Herbert L. Bright and his wife as joint owners of one half of the company's stock. Mr. and Mrs. Kahn were the officers and directors of petitioner. Bright was its agent in charge of outside work, but was neither an officer nor a director.

Prior to the execution of the Parkville contract, Kahn and Bright had formed "Kahn Engineering Co. of Md., Inc." (R., p. 25). At the time the Parkville

contract was entered into by the plaintiff, Kahn and Bright were the stockholders of the Maryland corporation, (R., p. 25) and were officers. (R., p. 25). Mark C. Fox was president of the Maryland corporation at this time. (R., p. 25) Later, Fox was succeeded by L. Ray Troxell, Jr. (R., p. 96). There seems to have been an informal arrangement by which the employees of the Maryland corporation supervised the Parkville work for the petitioner. (R., p. 45). However, nothing in the record indicates that the contract was assigned to the Maryland corporation, or that the Maryland corporation assumed any financial responsibility for the performance of the work. Prior to April, 1954, three of the checks issued by the County officials had been made payable to Kahn Engineering Co. of Md., Inc. (R., pp. 56, 58, 60)

In April, 1954, Kahn sold his stock in the Maryland corporation to Bright, (R., p. 25) who became its sole stockholder. The name of the Maryland corporation was, at that time, changed to Academy Construction, Inc. The officials of Baltimore County in charge of the Parkville job were advised of this change of name of the Maryland company, (R., pp. 86, 95). There after, the County's checks were made payable to "Kahn Engineering Company."

The authority to indorse any checks which belonged to the petitioner was limited by its by-laws (R., pp. 122, 123, Plaintiff's Exhibit #7, Article VII) to its treasurer, and as to him, the authority was limited to the endorsement of checks for deposit in the corporate depositary, the Anacostia National Bank of Washington, D. C. (R., p. 120). Troxell was not an officer, nor even an employee, of the petitioner. (R., p. 27) Mr. Kahn, who was petitioner's treasurer (R.,

p. 21), testified that he had never authorized Troxell to negotiate any checks belonging to the Petitioner. (R., p. 32).

The check here in suit was dated August 11, 1954, and was intended to pay the August requisition on the Parkville contract. On August 13, 1954, it was endorsed by Troxell with the following endorsement:

> Kahn Engineering Co.
> L. Ray Troxell Jr.
> President
> Deposit to Account of
> Academy Construction Inc.

The check was then accepted by American Security & Trust Co. as a part of a deposit by Academy Construction Inc., which had opened its account with the bank on August 10, 1954, (R., p. 102). The bank had never dealt with Kahn Engineering Co., Inc. (R., p. 32).

The bank's handling of the check in question was described by Mr. Chester Sellner, its treasurer, who testified, "The check was accepted as a deposit along with three other checks, nor was it known at the time that the check was payable to Kahn Engineering Company, . . ." (R., p. 100). The bank had no knowledge of any of the facts concerning the Parkville job, nor as to the companies involved. (R., p. 101) Mr. Sellner described the endorsement as "abnormal" (R., p. 102), and testified: (R., p. 103)

> Q. And it was made payable to a different corporation and transferred by an unusual endorsement in banking practice, from one corporation to another, and your bank didn't make any investigation to find out anything about any of these corporations; is that correct, Mr. Sellner? A.